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No. 74-687

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent incorrectly contends that the government's claims against the insolvent debtor, Emsco, were contingent and unliquidated at the time of the assignment and therefore not entitled to priority (Resp. Br. 9).

a. Emsco's liabilities to the government for breach of contract were not contingent. At the time of the assignment for the benefit of creditors, Emsco already had repudiated or otherwise defaulted on its obligations under all three contracts. Accordingly, its liability for

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breach of contract was not "contingent" on subsequent events. The fact of liability was fixed irrespective of whether the government would later choose to recontract with third parties, and that liability could have been enforced prior to the date of assignment in a suit for a declaratory judgment and damages. Cf. 32 C.F.R. 8.602–7(b); Uniform Commercial Code § 2–713. Only the appropriate measure of damages, not the fact of liability, could be said to have been uncertain on the latter date.[1]

The fact that respondent unsuccessfully contested Emsco's liability in an administrative proceeding after the assignment (Resp. Br. 2–3) does not indicate that the debt had previously been contingent. See, *e.g.*, *United States* v. *Butterworth-Judson Corp.*, 269 U.S. 504; *United States* v. *National Sur. Co.*, 254 U.S. 73.

[1] A private purchaser in the government's position would have had the right to choose, under the Uniform Commercial Code, adopted in Texas, between (1) "covering" by repurchasing, in which case the seller would be liable for the difference between the cost of covering and the contract prices, and (2) recovering from the seller the difference between the contract price and the market price when the buyer learned of the breach; the buyer would also be entitled in either case to recover incidental and consequential damages less expenses saved by the breach. Tex. Code Ann., Bus. and Commerce, §§ 2.712, 2.713, 2.715 (1967); Uniform Commercial Code §§ 2–712, 2–713, 2–715. Although these authorities are not directly applicable to government contracts, such contracts often embody similar principles. The instant contracts are not part of the record, which also does not specifically indicate the extent of any incidental or consequential damages suffered by the government. The critical factor here, however, is not the precise amount of the government's damages but the fact that Emsco's liabilities for whatever damages its breach had occasioned had already accrued on the date of the assignment and their amount could readily have been ascertained within a reasonable time.

Respondent concedes as much by agreeing that disputed tax claims are "debts due" entitled to priority (Resp. Br. 11). Nor was Emsco's liability rendered contingent by the theoretical possibility that "Emsco would be excused from performance" (Resp. Br. 9).[2] Of course, any debt that has accrued may subsequently be settled or even forgiven. If that possibility prevented a debt from becoming "due" under the priority statute, that statute would be rendered a nullity.

b. The precise amount of the government's damages had not been ascertained at the time of the assignment for the benefit of creditors. But as we point out in our main brief (pp. 9–24), neither reason nor precedent supports a reading of the priority statute that would exclude the government's claim on that account.

While professing not to argue that "all the stringent requirements of the common law action of debt" (Resp. Br. 7) must be applied in determining what is a "debt" under the priority statutes, respondent nevertheless relies heavily upon such common law actions (Resp. Br. 4, 7–9) in asserting that the statutes are inapplicable to debts that are unliquidated. But taxes, which respondent acknowledges as one of the principal categories of "debts" due to the United States that are entitled to priority, may also be unliquidated. Respondent argues that "[t]axes are 'debts due' because they are reasonably liquidated claims; the amount due is certain

[2] Respondent's related argument that "the United States is not actually out any money" because of Emsco's defaults (Resp. Br. 11) ignores the fact that when the contracts were relet after Emsco's defaults the government had to pay higher prices for the same goods that Emsco had contracted to supply (see Pet. Br. 5).

or readily may be made certain" (Resp. Br. 11). While that may often be so, it is not invariably the case; in many circumstances both the fact of the taxpayer's liability and the amount of that liability may be uncertain, yet such uncertainty does not prevent the federal priority from attaching. Cf. *United States* v. *Barnes,* 31 Fed. 705 (C.C. S.D. N.Y.); *United States* v. *Bryan,* 9 Cranch 374, 386–387. There is no intrinsic difference between "uncertain" tax debts and "uncertain" contract or other debts that warrants granting priority to the former but not the latter.

Moreover, respondent's acknowledgement that the priority attaches to "claims" for taxes (Resp. Br. 11) substantially undermines his contention that the priority statute applies to "debts" owed the United States by, but not "claims" of the United States against, a government contractor (*id.* at 7–8, 10).[3]

[3] Respondent's reliance (Resp. Br. 7–8) upon cases concerning what constitutes "indebtedness" of a taxpayer to another person for various purposes under the internal revenue laws is misplaced, for such cases turn on the particular language and purpose of the provisions involved. For the same reasons, respondent's reliance upon cases determining what constitutes a "debt" for varied purposes under state law (Resp. Br. 8–9) is also misplaced. The considerations that might lead a court to conclude, for example, that a sailor's claim for wages for a voyage was not a "debt" owing to him, and hence not subject to attachment by his creditors, until his voyage had been completed (see *Wentworth* v. *Whittemore*, 1 Mass. 471), would not necessarily support a conclusion that a different type of liability somewhat uncertain in amount is not a "debt" to which the federal priority attaches.

In any event, we do not contend that a distinction between "debts" and other "claims" is no longer appropriate in any circumstances, but only that the narrow common law definition of "debt" adopted by the court of appeals and proffered here by respondent

c. In an effort to avoid the weight of authority applying the priority statutes to "unliquidated" contract debts like Emsco's, respondent asserts that the cases say "nothing about the matter of priority" (Resp. Br. 12), referring specifically to *United States* v. *Brunner,* 282 F. 2d 535 (C.A. 10). In that case, however in reversing the disallowance of the government's contract debt as a priority claim in bankruptcy, the court of appeals specifically remanded "with instructions that * * * the United States [be] given the statutory priority for the balance of its claim." *Id.* at 539.[4]

2. Respondent also contends that application of the federal priority statutes to the debts created by Emsco's multiple defaults on defense contracts would be "harsh,"

is unwarranted by the language, purpose, history, and long-standing construction of the priority statutes. In this connection, we note that the current definition of "debt" in the Bankruptcy Act, 11 U.S.C. 1(14), includes broadly "any debt, demand, or claim provable in bankruptcy." This definition is unchanged from the original language enacted in 1898. 30 Stat. 544. The earlier bankruptcy acts also apparently rejected the narrow common law definition of "debt." 2 Stat. 32; 5 Stat. 444–445; 14 Stat. 525–526.

[4] Respondent also suggests that *United States* v. *State Bank of North Carolina,* 6 Pet. 29, stands for the proposition that the term "debt" in the priority statute "was to be interpreted in the sense of the common law maxim: *debitum in praesenti, solvendum in futuro*" (Resp. Br. 8). But the Court in that case first construed the language of the priority statute as including within the term "debts due" at insolvency all "debt[s] then arising to the United States, whether then payable, or payable only *in futuro.*" 6 Pet. at 36. It was only after analyzing why the statute should properly ~~be a debt due even under the principle of *debitum in praesenti*~~ estate would be held liable to the United States that the Court noted that the custom house bond at issue in that case would also be a debt due even under the principle of *debitum in praesenti, solvendum in futuro. Id.* at 39.

be read as including any type of debt for which the debtor's

"detrimental," and "unfair" to Emsco's other creditors (Resp. Br. 4, 6, 10, 12–14). Presumably creditors in competition with the government would invoke those epithets in opposition to any application of the priority statute. But the wisdom of the priority statute as a matter of social policy is a question for Congress to decide. And, as this Court has repeatedly acknowledged, Congress has made and long adhered to the legislative judgment that the needs of the government outweigh any attendant harshness for non-prioity creditors, a judgment that this Court has effectuated by liberally construing the statutory grant of priority (see, *e.g.*, Pet. Br. 14–16, 19–22).[5]

At bottom, respondent's claim of harshness is directed at the general operation of the priority statute and not to any equitable considerations uniquely or even especially present in this case.[6] Respondent has

[5] Respondent speculates that the government's fiscal policy does not depend to any substantial degree on contract debts (Resp. Br. 11). But it could likewise be said that the fisc is not substantially dependent upon the application of the priority statute to tax debts, because only a relatively small proportion of the government's revenues are accounted for by tax debts collected pursuant to the priority statutes. In both cases, however, the need to apply the priority statute at all arises only in exceptional circumstances—insolvency, bankruptcy, *etc.*—and within that context there is no less reason to apply the priority statutes to contract debts than to tax debts. In any event, Congress has made no distinction in 31 U.S.C. 191 between various types of debts owed to the United States.

[6] Respondent asserts that other creditors who "perhaps extended credit on the strength of the government contract * * * had no opportunity to anticipate the extent of the possible governmental claims because of the unliquidated nature of such claims" (Resp. Br. 13). However, the record here does not support the suggestion that any creditors were misled into extending credit because they were ignorant of the government's claims. All of the creditors'

not shown that creditors are any more harshly or adversely affected by application of the priority statute to debts that are unliquidated on the date of insolvency than to debts that are liquidated or otherwise certain in amount.

For the reasons stated in our opening brief and in this reply, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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claims were based on transactions preceding Emsco's assignment for the benefit of creditors on October 20, 1966, and those creditors would have been in the same position if on or shortly before that date the government had reprocured to cover Emsco's defaults, thereby fixing the amount of damages.

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